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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	:	Chapter 11
	:	Case Nos. 00 B 41065 (SMB)
RANDALL'S ISLAND FAMILY GOLF	:	through 00 B 41196 (SMB)
CENTERS, INC., <u>et al.</u> ,	:	
	:	(Jointly Administered)
Debtors.	:	
	:	
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RESPONSE OF DEBTOR AND DEBTOR-IN-POSSESSION
TO OBJECTION OF HIGHLANDER TOWNGATE, LTD. TO
PROPOSED ASSUMPTION AND ASSIGNMENT OF LEASE

TO THE HONORABLE STUART M. BERNSTEIN
UNITED STATES BANKRUPTCY JUDGE:

GBGC Family Golf Centers, Inc. ("GBGC"), one of the
above-captioned debtors and debtors-in-possession (the
"Debtors"), for its response (the "Response") to the objections
of Highlander Towngate, Ltd. ("Highlander") to the proposed
assumption and assignment of the Lease (as defined below),
respectively states as follows:

Introduction

Highlander objects to GBGC's proposed assumption and
assignment of the Lease on the basis that certain maintenance
defaults exist under the Lease and that personal property covered

by the Lease is allegedly missing. In reality, Highlander is seeking to force GBGC to completely renovate the facility prior to the assignment of the Lease, even though neither the Lease nor the Bankruptcy Code requires it. This is evidenced, in part, by the fact that Highlander has never asserted these so-called "defaults" before and is raising these defaults only in connection with the assignment of the Lease. In addition, Highlander's arguments about missing personal property is completely misguided. GBGC does not have any obligation under the Lease to keep on the Premises all personal property it acquires during the life of the Lease. Moreover, the personal property which Highlander asserts is missing has, in fact, been replaced with newer equipment now being used in connection with the facility's ongoing operation. It appears that Highlander's demands for remuneration amount to little more than an attempt to take advantage of GBGC's need to assign the Lease.

Background

On May 4, 2000, (the "Filing Date") each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. By order of this Court dated as of the Filing Date, the Debtors' chapter 11 cases are being jointly administered. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors are continuing to operate their businesses and manage their properties as debtors-in-possession.

The Debtors operate golf, ice skating and family entertainment centers throughout North America. As of the Filing

Date, the Debtors owned and/or operated 100 golf facilities and 17 ice skating and family entertainment centers.

The Lease

On April 1, 1994, Highlander and RIR Associates ("RIR") entered into a lease (the "Prime Lease"), pursuant to which Highlander leased the real property located at 22255 Eucalyptus Avenue, Moreno Valley, California (the "Premises") from RIR for the purpose of operating a golf training and recreation center. Highlander later subleased the Premises and the related personal property (the "Personal Property") to Golden Bear Golf Centers, Inc. ("Golden Bear") by that certain lease dated September 13, 1996 (the "Lease"). On June 16, 1998, Family Golf Centers, Inc. entered into a Stock Purchase Agreement (the "Stock Purchase") pursuant to which Family Golf purchased all of Golden Bear's outstanding shares. In connection with the Stock Purchase, Golden Bear became known as GBGC Family Golf Centers, Inc. By letter dated July 20, 1998, Highlander consented to the Stock Purchase.

The Proposed Assumption and Assignment of The Lease and Highlander's Objections

On July 19, 2000, the Debtors filed a motion (the "Motion") seeking authority to, among other things, assume and assign certain leasehold interests, including the Lease. In response to the Motion, on July 28, 2000, Highlander filed a conditional objection (the "Conditional Objection") which stated that Highlander would not object to the assumption and assignment

of the Lease on the condition that GBGC satisfied the requirements of section 365 of the Bankruptcy Code, and provided that GBGC did not attempt to sell separately the personal property covered by the Lease. The Conditional Objection did not allege the existence of any maintenance defaults under the Lease.

On August 1, 2000, the Debtors entered into a sale agreement (the "Sale Agreement") with Klak Golf, LLC ("Klak") for the sale of certain of the Debtors' fee-owned and leasehold interests, including the Lease. By order dated September 7, 2000, the Sale Agreement was approved by this Court. On August 9, 2000, Highlander asserted by letter to Debtors' counsel that they would not oppose the assumption and assignment of the Lease to Klak provided that GBGC cured all existing defaults and assigned all personal property located on the Premises to Klak. Highlander attached a list of cure amounts, which included certain rent, taxes and interest. Again, Highlander did not allege any maintenance defaults.

On October 19, 2000, GBGC served upon Highlander a notice of proposed assignment of lease to Klak Golf Prime, LLC ("Klak Golf") and statement of cure amounts, which included certain unpaid rent and taxes that GBGC believes are necessary to cure existing defaults. On November 1, 2000, Highlander filed an amended conditional objection (the "Amended Objection") to GBGC's proposed assumption and assignment of the Lease to Klak Golf and cure amounts. In its Amended Objection, Highlander asserted, for the first time, a number of maintenance "defaults" that it

claimed must be cured prior to assuming and assigning the Lease. GBGC believes, however, that these are not defaults under the Lease which need to be cured, but rather are normal maintenance issues which will be addressed by Klak Golf, as the new tenant.

Highlander also asserts in its Amended Objection that there are a number of items of personal property missing from the Premises which GBGC must either replace or pay the replacement value therefore. GBGC, however, disagrees with Highlander's interpretation of the Lease. Moreover, with the exception of a few items of nominal value, the items Highlander asserts as missing have been replaced either with newer equipment of much greater value, or with equipment better suited to Klak Golf's operation of the Premises.

The Alleged Defaults

As stated above, Highlander alleges in its Amended Objection the existence of various maintenance defaults under the Lease that GBGC must cure prior to assuming and assigning the Lease to Klak Golf. The alleged defaults, which by Highlander's calculation could cost over \$425,000 to cure, were never communicated to GBGC prior to the filing of the Amended Objection and consist of basic maintenance issues normally addressed prior to the beginning of the season. By the timing of its actions, Highlander has apparently chosen to wait until the eve of assignment to pressure GBGC into renovating the facility before assigning the Lease. Neither the Lease, California law, nor the Bankruptcy Code, however, require GBGC to do so.

Paragraph 8 of the Lease states that upon the expiration of the stated term or upon any earlier termination, "Tenant shall surrender the Premises, the Improvements and the Personal Property in at least as good condition as at the date hereof, *ordinary wear and tear excepted*." As such, the Lease presumes that wear and tear to the Premises will occur and explicitly excepts GBGC from the obligation to correct the effects of normal wear and tear.

Courts interpreting similar provisions under California law have held that tenants are not required to rebuild the premises at the expiration of the Lease. The California Court of Appeals, in Kanner v. Globe Bottling Co., 78 Cal. Rptr. 25 (Ct. App. 1969), reviewed a dispute between a landlord and tenant in which the landlord alleged that the tenant failed to deliver the premises as received. The court held that:

[t]he exception of ordinary wear and tear contemplates that deterioration will occur by reason of time and use despite ordinary care for its preservation. A tenant is not required to renovate the premises at the expiration of his lease; a covenant to repair should be reasonably interpreted to avoid placing any unwarranted burden of improvement of the lessor's premises on the lessee.

Id. at 29.

The defaults asserted by Highlander are not defaults under the Lease, they amount to nothing more than normal wear and tear during the season and will be remedied through normal maintenance of the Premises by Klak Golf prior to the beginning of the next season. Highlander's assertion that GBGC must

renovate the Premises prior to assumption and assignment of the Lease is simply not supported by the Lease or applicable law.

The Alleged Missing Personal Property

Highlander also alleges for the first time in its Amended Objection that there are a number of items of personal property missing from the Premises and claims that GBGC must either replace or pay the replacement value of such missing personal property. In effect, Highlander is asserting that any personal property that has ever been used in connection with the operation of the facility must remain on the Premises or that the value of such property must be paid to Highlander. Apparently, this is true even if such property becomes worthless and is replaced by newer, more valuable property. This is clearly not a logical construction of the Lease.

Highlander bases its claim on paragraph 1 of the Lease, which provides that the "Tenant hereby grants to Landlord a security interest in Tenant's interest in all hereafter acquired items of Personal Property." Paragraph 1 also defines personal property as all personalty on the Premises on the effective date of the Lease and all "property which may hereafter be acquired by Tenant and used, installed or placed on the Premises by Tenant pursuant to the terms of this Lease." Under Paragraph 8 of the Lease, GBGC is obligated to surrender the personal property to Highlander upon the expiration of the Lease or the earlier termination of the Lease.

Presumably, the purpose of paragraphs 1 and 8 of the Lease is to enable Highlander to continue to run the business when the Lease expires or in the event the Lease is terminated and the Premises are surrendered to Highlander. Consistent with this intent, outdated or inoperable equipment has been replaced with newer and better equipment, thus enabling future operators of the Premises to continue the business as required under the Lease. Although the tenant under the Lease is obligated to leave Highlander the personal property used in operating the business at the end of the Lease, we are not at that point in time and the business is still being operated. As a result, Highlander's future interest in whatever personal property is used in operating the business at the expiration of the Lease should not entitle Highlander to require useless equipment to remain on the Premises or money to be paid to them now.

GBGC reserves the right to amend and supplement this Response, including the submission of affidavits and other evidence, as the Court may require.

Conclusion

For the reasons set forth above, GBGC requests that the Court overrule Highlander's objections and authorize the assumption and assignment of the Lease to Klak Golf.

Dated: New York, New York
 November 22, 2000

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